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Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)
)
Amendment of Part 95 of the Commission's)
Rules to Provide Regulatory Flexibility in the)
218-219 MHz Service)
)

WT Docket No. 98-169
RM-8951

To The Commission:

REPLY COMMENTS OF THE 218-219 MHz LICENSEES

218-219 MHz LICENSEES

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Summary

The vast majority of commenters in this proceeding demonstrate support for the Commission's proposed revisions to its rules. With the exception of AirTouch Paging, all of the commenters agree that the 218-219 MHz service rules must be revised in order to promote the Commission's goals of regulatory parity, to enhance competition among wireless services and to further serve the public interest.

In order to maximize use of the 218-219 MHz spectrum, it is imperative that licensees have the ability to provide private or common carrier services, including the ability to interconnect with the PSN. By granting 218-219 MHz service licensees the flexibility to offer multiple services and interconnect with the PSN, as it has done for other wireless licensees, the Commission will not only ensure regulatory parity, but also will promote competition, provide additional capacity and enhance available services to the public.

Relaxation of the 218-219 MHz technical rules is critical to the success of the service. Use of the 218-219 MHz spectrum cannot be maximized until it is released from the stringent technical restrictions currently in place. Commenters have provided technical data that supports the elimination of the automatic power control capability restrictions, antenna height/power limitations, and the duty cycle limitations, in favor of reliance on the provision of Section 95.861(e) of the Commission's rules as sufficient protection from possible interference.

The 218-219 MHz Licensees reaffirm their support for modification of the Commission's proposed Amnesty option to refund ten percent (10%) of licensees' bids and

extend the "interest-only" period for payments of reamortized debt. Absent a longer period of interest-only financing, licensees would be forced to choose amnesty to avoid a balloon payment shortly after the technical rules for the 218-219 MHz service are finalized. Licensees who choose amnesty should only be required to forfeit ten percent (10%) of their auction bid price, consistent with the PCS licensees who chose amnesty.

Finally, the three-and five-year construction benchmarks should be replaced with a "substantial service" standard for all 218-219 MHz licensees. This result is consistent with the build-out requirements of other wireless services and ensures regulatory parity.

The 218-219 MHz Licensees believe the Commission's proposed 218-219 MHz service, with the modifications suggested herein and in their comments, will put 218-219 MHz service licensees on a level playing field with other wireless services. With the right rules in place, the Commission can ensure regulatory parity and promote competition among wireless services. Moreover, 218-219 MHz service licensees will be provided the flexibility needed to establish the 218-219 MHz industry so that service to the public can be realized.

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To The Commission:

REPLY COMMENTS OF THE 218-219 MHz LICENSEES

The 218-219 MHz Licensees¹ hereby submit their reply comments in the above captioned proceeding. In the Commission's Notice of Proposed Rulemaking ("NPRM")², the Commission is undertaking an examination of the Commission's rules governing the licensing and regulation of the frequencies in the 218-219 MHz band. The 218-219 MHz Licensees are one of twelve commenters, the vast majority of whom generally support the Commission's proposed revisions to its rules, especially in the areas of (i) providing licensees the flexibility to provide common carrier or private carrier services; (ii) extending the 218-219 MHz service license term to ten years; (iii) reamortizing the installment payment debt; (iv) granting

¹ These comments are filed on behalf of Faycomm, Inc. (formerly Euphemia Banas), Loli, Inc., Bay Interactive Ventures, Inc., Southeast Equities, Inc., A.B.R. Communications, Inc., CyberForce LLC, M&B XXXIX, Inc., Trans Pacific Interactive, Inc., Dunbar Television, Inc., KMC Interactive TV and Star Interactive Video, Inc. (the "218-219 MHz Licensees").

² Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service; Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, (FCC 98-228, WT Docket No. 98-169, 13 FCC Rcd ___, rel. September 17, 1998).

properly-filed grace period requests; (v) eliminating construction benchmarks in favor of a "substantial service" requirement; (vi) removing transfer restrictions; (vii) allowing aggregation, partitioning and disaggregation; and (viii) removing burdensome and unnecessary technical restrictions. The virtual unanimity of the commenters provides support for the Commission's comprehensive approach to amending the licensing and technical rules governing this service, thereby positioning the 218-219 MHz service industry to succeed. The 218-219 MHz Licensees reaffirm the positions advocated in their comments and focus these reply comments on areas of disagreement.

I. The Commission's Proposed Revisions to the Rules Serve the Public Interest.

The 218-219 MHz Licensees disagree with AirTouch Paging's ("AirTouch") contention that the proposed revisions to the Commission's 218-219 MHz service rules will "undermine the integrity of the auction processes" and "not serve the public interest."³ It is a matter of record that when the rules were adopted for this service, both the Commission and prospective licensees believed that the technology and equipment required for such services was developed and that there would be ample opportunity to develop the 218-219 MHz service licenses. However, it has been four years since 218-219 MHz service licensees have acquired their licenses, and viable technology is still not commercially available.⁴ Surely rigid adherence to overly burdensome regulatory restrictions which have stunted the entire 218-219 MHz service industry for four years does not advance the public interest. Moreover, the

³ Comments of AirTouch Paging, p. 2.

⁴ See, e.g., Comments of Kingdon Hughes, pp. 1-2; and Comments of Dispatch Interactive Televisions Company, p. 3.

Commission has consistently recognized the mandates of Section 309 of the Act in modifying its rules as necessary to promote the development of competitive services.⁵

AirTouch further asserts that because 218-219 MHz service licensees paid less for their spectrum than did narrowband PCS licensees ("NPCS"),⁶ the elimination of the "fundamental regulatory differences" between the two types of spectrum would undermine the integrity of the auctions. However, there are a number of reasons why the NPCS licenses were auctioned at higher prices per "pop," than the 218-219 MHz band. The NPCS service areas are "nationwide, regional, Major Trading Areas (MTAs) and Basic Trading Areas (BTAs),"⁷ and NPCS authorizations for the entire country were auctioned at the same time. Thus, NPCS licensees could take advantage of economies of scale and scope, knowing that seamless nationwide coverage could be provided. In contrast, 218-219 MHz service license service areas were much smaller (MSAs), and the rural licenses (RSAs) were never auctioned, thus precluding even regional ubiquity. Moreover, unlike 218-219 MHz service licensees, during the four years since their auction, NPCS licensees have had available viable technology and opportunities to develop profitable businesses from their licenses. Therefore, AirTouch's protestations concerning the importance of maintaining the "integrity of the auction process" strike a hollow chord. Indeed, these two "industries" are demonstrably different and thus Air Touch's claim that the integrity of the auction process would be compromised by the proposed changes is specious.

⁵ The Commission shall promote "economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people . . ." 47 U.S.C. § 309(j)(3)(B) (1998).

⁶ Narrowband PCS spectrum sold on average for \$3.10 per MHz/pop, while IVDS spectrum sold on average for \$0.85 per MHz/pop. See Comments of AirTouch Paging, at p. 5.

⁷ 47 C.F.R. § 24.102 (1998).

Indeed, the Commission's NPRM is designed to promote the public interest by removing the regulatory and technical barriers which have, in the view of the 218-219 MHz Licensees, unnecessarily stymied the development of the industry. In the end, AirTouch's comments must be viewed for what they really are - a transparent attempt to protect its commercial interest at the expense of the 218-219 MHz service licensees and the public in general.

II. 218-219 MHz Service Licensees Should Have the Ability to Interconnect to the PSN.

Over 90% of the commenters agree with the Commission's proposal to give the 218-219 MHz service licensees the flexibility to provide common carrier or private carrier services, including the ability to interconnect to the PSN. AirTouch is the only party that objected by asserting that the Commission had once rejected the idea of permitting IVDS interconnection with a PSN and has not "set forth a reasoned analysis for its intended departure from past practices."⁸ In fact, the Commission has provided a rational basis for this position by recognizing that, "in order to fully accommodate the wide array of service offering emerging in the 218-219 MHz Services, and those contemplated for future development" the flexibility offered to 218-219 MHz service licensees to provide common carrier or private carrier services is "consistent with Commission precedent that authorizing a wide variety of services comports with [its] statutory authority and serves the public interest by fostering the provision of a mix of services."⁹ Second, by enabling the 218-219 MHz service licensees to offer multiple services, the Commission would ensure regulatory parity

⁸ Comments of AirTouch Paging, p. 7.

⁹ *NPRM*, at ¶ 33.

among wireless licensees. The Commission has permitted other wireless service licensees, including LMDS¹⁰ and Broadband PCS¹¹ licensees, to provide both private and common carrier services and to interconnect with the PSN. The flexibility granted by such redesignation will prove to be beneficial as licensees continue their efforts to make the most productive use of their spectrum, thereby increasing competition and consumer choice.

The 218-219 MHz Licensees join all of the commenters who support the ability of 218-219 MHz service licensees to interconnect to PSN. Permitting interconnection with PSN and/or other CMRS providers, will "ensure that licensees have the flexibility to respond to marketplace demands,"¹² and will allow 218-219 MHz service "licensees to compete on equal footing with other CMRS providers."¹³ With the ability to interconnect with PSN or CMRS and to provide one-way communications and RTU-to-RTU communications, 218-219 MHz service licensees "could combine spectrum in strategic ventures with cellular, PCS, paging and other such services to provide additional capacity or enhanced services."¹⁴

A basic tenet of the Commission's licensing process is the maximization of the use of spectrum.¹⁵ By providing 218-219 MHz service licensees the flexibility to provide common

¹⁰ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group petition for Pioneer Preference, Second Report & Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) ("*LMDS Second Report and Order*").

¹¹ Second Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Second Report*, 12 FCC Rcd 11267 (1997).

¹² Comments of Dispatch Interactive Television Company, p. 4.

¹³ Comments of Kingdon Hughes, p. 3.

¹⁴ Comments of In-Sync Interactive Corporation, p. 3.

¹⁵ See, 47 U.S.C. § 309(j)(3)(D) (The Commission shall seek to promote "efficient and intensive use of the electromagnetic spectrum").

carrier or private carrier services, as well as the ability to interconnect with PSN, the Commission is enabling the "highest and best use" of spectrum. The opportunities to promote competition, provide additional capacity, and enhance available services to the public ought to guide the Commission in this matter, rather than the commercial interests of an entrenched carrier.

III. The Technical Restrictions Currently In Place Are Not Needed and Should Be Eliminated.

The 218-219 MHz Licensees join the majority of the commenters in supporting the elimination of the unnecessary and burdensome technical restrictions currently in place, namely (i) the automatic power control capability restrictions, (ii) the antenna height and transmitter power restrictions, and (iii) the duty cycle limitation. Commenters in this proceeding have provided useful data to support the elimination of these restrictions.¹⁶

The Commission has recognized that the services envisioned for the 218-219 MHz service now "are very different from those anticipated to be provided" when the spectrum was originally licensed.¹⁷ Indeed, the interference protections originally contemplated for the television set-top boxes are unduly restrictive in the context of evolving uses for the spectrum. As the Bay Area Group suggests, one likely future 218-219 MHz service is the low power mobile applications, which do not contain the risk of interference with adjacent spectrum services, such as television channel 13.¹⁸ In addition, Community Teleplay, Inc. provides

¹⁶ See Comments of Community Teleplay, Inc., Appendix A; Comments of In-Sync Interactive Corporation; and Comments of Kingdon Hughes; Comments of the 218-219 MHz Licensees, Exhibit A.

¹⁷ Phoenix Data Communications, Inc. Request for Waiver of Section 95.855 of the Commission's Rules, Order, DA 98-972, 13 FCC Rcd ____ (released May 21, 1998).

¹⁸ Comments of Bay Area 218-219 MHz Group, at 5.

technical data which supports the relaxation of the technical restrictions for services such as its vehicle monitoring service.¹⁹ The 218-219 MHz Licensees incorporate the conclusions of Community Teleplay, based upon their study, authored by Old Dominion University's respected Professor A.M. Blischak, with respect to the duty cycle limitations and the antenna height and transmitter power limitations.²⁰

As the Commission has recognized in the NPRM, the Automated Maritime Telecommunications Systems (AMTS) service operates in the 216-218 MHz band, which is immediately adjacent to channel 13. Neither duty cycles nor similar height-power restrictions are imposed on AMTS transmitters and those licensees are allowed to operate at significantly higher power than 218-219 MHz licensees, who are 2 MHz *further away* from channel 13.²¹

Moreover, the 218-219 MHz Licensees maintain that the provisions of 47 C.F.R. § 95.861(e) provide the necessary protections to guard against interference with channel 13. Therefore, even if interference were ever to occur, television licensees have ample remedies available. DITV was the only commenter which argued against reliance on § 95.861(e) and they failed to provide any basis for their position, other than to simply state that they oppose "any suggestion that the Commission rely exclusively on the overall interference provision contained in section 95.861 of its rules."²² Ultimately one must realize that this spectrum has laid virtually dormant, not for the lack of effort by 218-219 MHz service licensees, but because the technical rules strangled viable service development. Real, meaningful changes to the

¹⁹ Comments of Community Teleplay, Appendix A.

²⁰ Comments of Community Teleplay, p. 17.

²¹ See, Comments of Kingdon Hughes, p. 9.

²² Comments of Dispatch Interactive Television Company, p. 7.

technical rules must have as their foundation reliance on Section 95.861(e). The Commission, supported by every commenter, save DITV, should compel that result.

IV. The Amnesty Option Should be Modified to Refund 10% of 218-219 MHz Service Licensees' Bids.

It is clear that commenters in this proceeding agree that the amnesty option proposed by the Commission requires modification.²³ The 218-219 MHz Licensees recognize that the Commission must consider the amnesty issue in the context of its treatment of similarly situated auction licensees. Indeed, the 218-219 MHz Licensees believe that their proposal for the Commission to refund the second 10% payment made by 218-219 MHz service licensees is the equitable relief which will affect the largest number of licensees. This solution is consistent with the similar option provided to C-Block PCS licensees and ensures regulatory parity.²⁴

V. The "Interest-Only" Period for Payments of Reamortized Debt Should Be Extended.²⁵

In their original comments in this proceeding, both the 218-219 MHz Licensees and In-Sync Interactive Corporation urged the Commission to reamortize the 218-219 MHz

²³ See, Comments of the Bay Area 218-219 MHz Group and Kingdon Hughes (calling for full amnesty with a refund of all payments made to the Commission by licensees); and Comments of In-Sync Interactive Television (requesting a 120-day period during which licensees contemplating license surrender may sell their licensees, the assignee assuming the installment payment obligations at a discounted rate).

²⁴ The 218-219 MHz service licensees paid 20% of their bids as a down payment, rather than the 10% paid by PCS licensees. Therefore, the 70% prepayment credit (or 30% penalty) for 218-219 MHz service licensees is not equal to 3% of the net high bids, as it was for PCS, but rather is equal to 6% of the net high bid. The Commission can remedy this inequity by refunding the second 10% down payment made by 218-219 MHz service licensees and then apply the 70% credit for the balance. This results in a 70% credit which is consistent with C-Block PCS and with the Commission's Part 1 default rules.

²⁵ The 218-219 MHz Licensees also support Community Teleplay's suggestion that the Commission resolve the pending Application for Review of the Commission's denial of a 25% refund or credit with respect to the license payments due to the unconstitutional bidding preference applied in the 1994 218-219 MHz service

service license debt over a ten-year license term, with interest-only payments for the first five years.²⁶ However, the 218-219 MHz Licensees have considered the suggestion by Community Teleplay that interest-only payments should be required for the first two quarterly payments which are due following the conclusion of this proceeding.²⁷ The 218-219 MHz Licensees believe the proposal of Community Teleplay is reasonable and now propose that the Commission extend the period of interest-only payments to the later of (i) five years from the license grant date, or (ii) the first two (2) quarterly payments which come due under the revised rules. In order to have any realistic chance to plan for and build a business following the Commission's order in this matter, the payment obligations must be ramped-up slowly, while at the same time ensuring that the U.S. Government receives the full value of the bid amount during the term of the retained licenses.

VI. The Three- and Five-Year Construction Benchmarks Should be Replaced with a "Substantial Service" Standard.

In the NPRM, the Commission proposes to eliminate the three- and five-year construction benchmarks in favor of a "substantial service" showing. If the rules are amended to extend the 218-219 MHz service licenses to a ten-year term, the Commission further proposes to require that all 218-219 MHz service licensees either make service available to at least 20 percent of the population or land area, or demonstrate substantial service, within ten years of license grant.²⁸ In its comments, Community Teleplay suggested instead that 218-219

auction. The 218-219 MHz Licensees believe in the merits of the petitioners in that case and agree that the Commission should grant the non-preferred class a 25% refund or credit, whichever is applicable. *See*, Comments of Community Teleplay, pp. 14-15.

²⁶ Comments of In-Sync Interactive Corporation, p. 6.

²⁷ *See*, Comments of Community Teleplay, Inc., p. 12.

²⁸ *NPRM*, ¶ 45.

MHz service licensees be "subject to the substantial performance benchmark at year 6 of the extended license term, with license cancellation the consequence for not meeting the benchmark."²⁹

The 218-219 MHz Licensees disagree with Community Teleplay and strongly support the Commission's proposal. Year 6 of the 218-219 MHz service license term will likely arrive less than twelve months after the Commission's final Order in this proceeding. That is not enough time for licensees to formulate business strategies and for research and development to be completed under the new technical rules. If the Commission, as Community Teleplay proposes, were to subject licenses to cancellation for failure to demonstrate substantial service at Year 6, it could effectively negate all of its efforts in this proceeding to make the 218-219 MHz service more viable.

The 218-219 MHz Licensees also disagree with the suggestion by Community Teleplay that lottery licensees should be held to a more stringent build-out standard than auction licensees.³⁰ It is important for the development of the 218-219 MHz service industry that service be provided in the largest metropolitan areas³¹ and to have all licensees working with the same regulatory calendar. Any other result can have the effect of frustrating potential joint-ventures by creating disparate operating platforms and incompatible service offerings.³²

²⁹ Comments of Community Teleplay, Inc., p. 11.

³⁰ See, Comments of Community Teleplay, Inc., p. 8 (suggesting that the Commission retain the five-year construction benchmark for lottery winners).

³¹ The top 9 MSAs - New York, Los Angeles, Chicago, Philadelphia, San Francisco, Dallas, Boston, Houston and Washington, DC - are covered by lottery licensees.

³² As noted in their comments, the 218-219 MHz Licensees also urge the Commission to eliminate the transferability restriction which prohibits lottery licensees to transfer, assign or sell licenses until the five-year construction benchmark has been met. The public interest associated with having all 218-219 MHz service licensees operating commercially on the same regulatory basis outweighs any antitrafficking concerns which formed the basis for the Commission's original construction benchmark rule.

Moreover, the regulatory parity objective cannot be met if licensees are subjected to impossible construction requirements simply because their licenses were granted by lottery.

The 218-219 MHz Licensees join the majority of commenters in their support of the Commission's proposal and urge the Commission to require a showing of substantial service within ten years from license date, as a condition for renewal for *all* 218-219 MHz service licensees. This result is consistent with the build-out requirements of other wireless services and ensures regulatory parity.³³

VII. Conclusion

The 218-219 MHz Licensees are pleased that the vast majority of commenters in this proceeding concur with the Commission's determination to improve the utility of the 218-219 MHz service. The 218-219 MHz Licensees believe the Commission's proposed 218-219 MHz service rule revisions will advance the public interest and, in summary, urge the Commission to (i) provide the flexibility to provide private or common carrier services, thereby allowing interconnection to the PSN; (ii) eliminate the unnecessary technical restrictions; (iii) modify the proposed amnesty option to refund 10% of the 218-219 MHz service licensees' bids, (iv) extend the interest-only payment period; and (v) eliminate the three- and five-year construction benchmarks in favor of a substantial service standard at renewal for all 218-219 MHz service licensees. The Commission's proposed rules, incorporating the minor modifications suggested herein, will have the effect of promoting the Commission's goals of regulatory parity and enhancing competition among wireless services. Moreover, they will

³³ See, e.g., *LMDS Second Report and Order*, 12 FCC Rcd at 12659-61; Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, Report and Order, 12 FCC Rcd 10785, 10843 (1997).

provide the flexibility needed to establish the 218-219 MHz service industry to better serve the public.

Respectfully submitted,

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I, Dawn M. Thames, with the law firm of Patton Boggs LLP, do hereby certify that the foregoing "Reply Comments of 218-219 MHz Licensees" were served on the below listed parties by First Class U.S. Mail this 25th day of November, 1998.

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